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Richard D. Lawson  
Director  
Federal Regulatory Relations  
United Telephone Companies

93-129 /

EX PARTE

May 3, 1993

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MAY - 3 1993

Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M. Street, N.W., Room 222  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

RE: In the Matter of Provision of Access for 800 Service,  
CC Docket No. 86-10, United Telephone Tariff Transmittal  
No. 216

Dear Ms. Searcy,

Representatives of the United Telephone companies met separately with Kathleen Levitz of the Common Carrier Bureau and Kathleen Abernathy of Chairman Quello's office Thursday, April 29, 1993, to discuss the Common Carrier Bureau's order regarding 800 data base tariffs. United was joined in the meeting with Ms. Levitz by Whitney Hatch of GTE. Mr. Hatch and Gail Polivy, also of GTE, participated in the meeting with Ms. Abernathy. A draft of the attached United request for stay was provided to Ms. Levitz, Mr. Vogt and Ms. Abernathy.

Sincerely,

Richard D. Lawson  
Director  
Federal Regulatory Relations

**Attachments**

cc: Kathleen Abernathy  
Kathleen Levitz  
Gregory Vogt

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**APR 29 1993**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
800 Data Base Access Tariffs )

CC Docket No. 93-129

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**MAY - 3 1993**

**PETITION FOR STAY**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

The United Telephone companies ("United") ask the Common Carrier Bureau to immediately stay that portion of the Bureau's April 28, 1993 Order ("Order") that suspends the amount of United's basic 800 database query rate that exceeds .0067 cents per query for five months and orders United to file tariff revisions reflecting this partial suspension on April 29, 1993.<sup>1</sup> United asserts that the Order is arbitrary, capricious and unlawful in this regard and that United will be irreparably damaged thereby.

The Order suspends for one day the basic 800 database query rate of all the LECs, including United, that own their own Service Control Point ("SCP") and allows the rates to become effective as filed, subject to an investigation and accounting order.<sup>2</sup> Under Section 204 of the Communications Act, 47 U.S.C.

1. In the Matter of 800 Data Base Access Tariffs, CC Docket 93-129, Order, (Common Carrier Bureau), DA 93-491, released April 28, 1993 at pars. 31 and 32.

2. See, Order at pars. 24 - 27 and Appendix B.

Section 204, the Commission may order refunds, with interest, of such portion of these rates, if any, ultimately determined through the investigation to be unlawful. This is the way the Order treats the RBOC 800 database query rates. However, rather than allowing United's entire rate to become effective as filed, subject to an investigation and accounting order, the Common Carrier Bureau further ordered that the amount of United's basic 800 database query rate that exceeds .0067 per query be suspended for five months pending investigation and that United must file tariff revisions reflecting this partial suspension on April 29, 1993.<sup>3</sup>

In ruling on stay petitions, the Commission follows the four-factor test established in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).<sup>4</sup> Under

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3. Order at pars. 31 and 32. The Bureau bases its decision wholly on the fact that United's proposed basic 800 database query rate is significantly higher than the "industry" average rate. (In this case the industry includes the seven RBOCs, the GTE Telephone Operating Companies, SNET and United.) No attempt was made to analyze United's cost support, cost support that even MCI acknowledges was the best offered by any LEC. See, United Telephone Companies FCC Tariff No. 5, Transmittal No. 316, MCI Petition For Rejection and Suspension and Investigation, filed March 18, 1993, at p. 10. And, more significantly, no attempt was made to analyze United's demand data or to compare United's demand data with "industry" demand data. CF. Infra pp. 4 - 5.

4. In the Matter of Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Order, FCC 92-551, released December 18, 1992 at par. 6.

this four-factor test a petitioner for a stay must demonstrate that (1) they are likely to succeed on the merits on reconsideration or appeal; (2) they will suffer irreparable harm absent a stay; (3) a stay will not cause substantial harm to other parties; and (4) there is no public interest reason to withhold a stay. The Commission has modified the first prong, holding that it will grant a stay upon a showing that its action raises serious legal issues, provided that the petitioner's showing on the other factors is particularly strong.<sup>5</sup>

A stay is warranted in this instance and the four-factor test is satisfied. First, United is likely to succeed on the merits when this matter is reviewed and this issue presents serious legal issues regarding the arbitrary nature of the Bureau's action. The bifurcated approach adopted by the Bureau, without conducting an investigation of the reasonableness of the costs used, in allowing all the filed rates to become effective except that amount in excess of .0067 cents per query is arbitrary, capricious, and unreasonable. The rationale behind allowing rates to become effective following suspension, and then subjecting the rates to an investigation and accounting order, is to allow the Commission sufficient time to determine the

that the ratepayers will not be damaged if the rates, or a portion thereof, are ultimately determined to be unjustified. To follow this very reasonable and rationale procedure only as to a portion of the rates, without having reached a conclusion about the reasonableness and appropriateness of the costs underlying the rates cannot be justified.

The Bureau's use of a purported statistical analysis and a mean rate cannot stand as a substitute for an investigation. The Bureau attempts to justify this procedure "since all LECs are deploying similar data base systems."<sup>6</sup> United does not dispute that the systems are similar -- however that does not mean that each LEC's demand or even costs are similar. Entering any type of order on rates, while ignoring costs and demand is arbitrary.

A review of the tariff transmittals submitted in this proceeding by the LECs owning their own SCPs indicates substantial differences in demand.<sup>7</sup> United's demand estimate was 740,940,896 interstate basic 800 data base queries. The mean demand for all LEC database owners, including United, was 1,999,484,501. Clearly, when United's demand is only 37% of the mean demand, the Bureau's use of its statistical analysis is arbitrary and guaranteed to produce arbitrary results.

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6. Order at par. 19.

7. See Order at Appendix B for a list of the referenced LECs and Tariff Transmittals.

Furthermore, if United's demand is normalized at the mean for all LEC SCP owners, the mean rate for all the United companies would have been approximately .0035 cents per query, substantially under the threshold rate of .0067 cents per query. Obviously, United's demand characteristics are so substantially different from the other LEC SCP owners,<sup>8</sup> that the Bureau's simple comparison of United rates to average "industry" rates fails to prove anything regarding the reasonableness of rates. The Bureau's use of "statistical analysis" in this situation penalizes United, not because of any determination regarding the unreasonableness of United's cost, but because of United's size. Accordingly, this action by the Bureau is arbitrary and

costs that may explain some of the difference in rates. For instance, United paid a \$2,250,000 right to use fee to Bellcore to be an 800 Database Owner/Operator.<sup>10</sup> This is the fee that entitles United to receive downloads of 800 Information Records from the national SMS database. This fee is necessary to the provision of 800 database and only relates to 800 database access service. However, with the exception of NYNEX, it is not readily apparent that the other BOCs incurred such a charge.

Furthermore, NYNEX's charge was less than half of United's.<sup>11</sup> Given the much larger demand that NYNEX and the other BOCs have as compared to United and the apparent cost difference from just this one item, it becomes more understandable why United's rates are higher than the other LECs.

United will be irreparably harmed if the stay is not granted. If United must file its tariff revisions, as ordered, on April 29, 1993, United will be forced to forego a minimum of \$564,696 in revenue from basic 800 data base queries through the five month suspension period.<sup>12</sup> At the end of the five months, if the Common Carrier Bureau determines that United's rates, as filed in Transmittal 316, were reasonable and may go into effect,

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10. D&J at Exhibit 2-8, p. 4.

11. See NYNEX D&J at Exhibit 2-1.

12. Said amount representing the difference in revenue derived from United's filed rates and the .0067 cents per query imposed by the Order.

United will be barred from recovering the foregone \$564,696 due to the prohibition on retroactive ratemaking in Section 203 of the Communications Act, 47 U.S.C. Section 203.

The granting of the stay will not cause substantial harm to other parties. Rather than order United to reduce its rates pending an investigation, and possibly causing United to irrevocably forego \$564,696 in revenue, the Commission has a ready means of insuring that no parties will suffer irreparable harm, while at the same time providing for lawful rates. As it did with RBOC rates, the Bureau can simply suspend the whole of United's proposed new charges, permit the rates to go into effect pending an investigation, order United to keep accurate accounts of the amounts received, and order refunds with interest if the charges are found to be unjust. Under this procedure, ratepayers are made whole and United is not forced to forego what may well be, and what United firmly believes to be, fair, reasonable and compensatory rates.

Finally, a stay is in the public interest. The Bureau's arbitrary reduction of United's rates coupled with the inability for United to be made whole if United's filed rates are ultimately determined to be reasonable, constitutes confiscatory ratemaking. The public interest is not served, but rather harmed



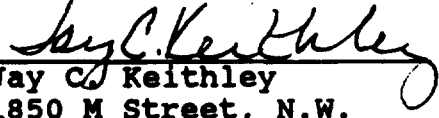
by such unwarranted agency action. Furthermore, as demonstrated above, the public interest will not be harmed by granting the stay. If the Commission will simply apply the same standards to United's entire filed rates as applied to other similarly situated LECs' rates, there is ample statutory authority to order refunds upon a finding, if any, that United's rates are unjustified.

Wherefore, United requests an immediate Stay that part of the Bureau's Order suspending the amount of United's basic 800 data base query rate that exceeds .0067 cents per query and requiring United to file tariff revision reflecting that suspension on April 29, 1993.

Respectfully submitted,

UNITED TELEPHONE COMPANIES

By

  
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THEIR ATTORNEYS

April 28, 1993

## **CERTIFICATE OF SERVICE**

I, Melinda L. Mills, hereby certify that I have on this 29th day of April, 1993, sent via Hand Delivery, or U.S. First Class Mail, postage prepaid, a copy of the foregoing "Petition for Stay" in the Matter of 800 Data Base Access Tariffs, filed this date with the Secretary, Federal Communications Commission, to the persons listed below.

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